

# Conducting Public Meetings

TOWN OF NANTUCKET

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# Overview of Presentation



- Procedural Aspects of Open Meeting Law
  - Enforcement
  - Administrative Responsibilities – Certification
  - Substantive issues including new definitions
- Scheduling Meetings
  - Notice: timing, manner, content
  - Location

# Overview of Presentation (cont.)

## ● Conducting Meetings - Specifics

- Agenda and order of meeting
- Open sessions
- Executive sessions
- Remote participation
- Public recording
- Minutes and documents
- Procedural matters: quorum, role of the chair, decorum, parliamentary procedure

# Open Meeting Law ("OML")



## ● Basic Facts

- Open meeting, public records and conflict of interest laws (sometimes referred to as “sunshine laws”) exist in virtually every state
- Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based

## ● MA Open Meeting Law (G.L. c.30A, §§18-25)

- In Massachusetts, the OML was revised as part of the 2009 Ethics Reform Bill (replaced OML G.L. c.39, §§23A-23C)
- Effective July 1, 2010



# The “New” OML



- Centralizes oversight and enforcement in Attorney General’s Office
- Alters and inserts important statutory definitions
- Imposes requirements for and regulation of meeting notices, minutes, executive sessions, exemptions, member participation and related administrative matters

# Enforcement Process



## ● Filing Complaint

- Must first file written complaint with public body, within 30 days of alleged violation
- Public body must forward complaint to AG within 14 business days of receipt and inform AG of any remedial action taken
- Not less than 30 days after date complaint was filed with public body, complainant may file a complaint with AG

# Enforcement (cont.)



- Public Body must consider complaint at properly posted meeting
  - Matter must appear on meeting notice
  - Body must acknowledge receipt of complaint
  - Should deliberate concerning allegations and possible resolution
  - Vote to resolve complaint
  - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant





# Enforcement (cont.)



- Remedial action may include:
  - making minutes of improperly called or held executive session public by including them as an addendum to minutes at a properly called meeting, or filing with Town Clerk
  - creating minutes if the same were not properly created, or supplementing minutes if they were not sufficiently detailed
  - providing for public deliberation and voting on matters considered at an improperly called or held meeting



# Enforcement (cont.)



- If public body cannot act within statutory time frame, or if such action would be difficult based upon particular circumstances, an extension of the time to respond may be requested
- To ensure that such request is viewed in a manner most favorable to the public body, extension request should be requested before expiration of statutory response time



## ● Cure:

- Consistent with prior case law, the AG recognizes: “Public deliberation (at a properly posted open meeting) effectively cured the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision. See OML 2011-14 (Wakefield School Committee)



- The Attorney General must:
  - Determine whether there has been a violation
  - Hold a hearing before imposing civil penalty
  - In the event a violation is found, determine whether the public body, or one or more of its members, or both, are responsible, and whether the violation was intentional

# Enforcement (cont.)



- In OML 2012-40, the AG determined that the Milford School Committee cured a violation of the OML, which occurred when a quorum deliberated outside a properly posted meeting, by raising the issue of the OML violation at the next meeting, explaining the nature of the violation, and recommending that the Committee reconsider its motion and vote at a later meeting after providing proper notice of the consideration of the subject

# Enforcement (cont.)



- Upon finding a violation, the AG may issue an order to:
  - Compel immediate and future compliance with OML;
  - Compel attendance at authorized training session;
  - Nullify in whole or in part any action taken at meeting;
  - Impose civil penalty upon public body of not more than \$1,000 for each intentional violation;
  - Reinstate employee without loss of compensation, seniority, tenure or other benefits;
  - Compel that minutes, records or other materials be made public; or
  - Prescribe other appropriate action





## ● Judicial Review of AG Order

- A public body or any member aggrieved by order may file certiorari action in Superior Court within 21 days of receipt of order
- AG order stayed pending judicial review
- If AG order nullifies action, public body shall not implement action



- Compliance
  - AG may file action in Superior Court to compel compliance with order or payment of civil penalty
- Alternative procedure
  - AG or 3 or more registered voters may initiate civil action in Superior Court to enforce OML



# Certification



- Must be done within 2 weeks of qualification for office
- Form prescribed by AG
- Acknowledge receipt of:
  - OML
  - Regulations promulgated by AG (pursuant to G.L. c.30A, §25)
  - Educational materials prepared by AG's office (pursuant to G.L. c.30A, §19)



# Definition: Meeting



- “[A] deliberation by a public body with respect to any matter within the body’s jurisdiction...,” with certain express exceptions.

# Definition: Meeting (cont.)



- Specifically excludes:
  - A quorum at an on-site inspection so long as members don't deliberate
  - Attendance by a quorum at a conference or training program or a media, social or other event so long as members don't deliberate
  - Attendance by a quorum at meeting of another governmental body that has complied with the notice requirements of the OML so long as the visiting members communicate only by open participation in the meeting of those matters under discussion by host body, and do not deliberate
  - A meeting of a quasi-judicial board held for the sole purpose of making a decision in an adjudicatory proceeding (State bodies only)



# Definition: Meeting (cont.)



- Practical Considerations when quorum of public body intends to go to meeting of another board, or discovers upon arrival that a quorum is present:
  - May be worthwhile to post meeting if members anticipate that they might want to discuss matters amongst themselves or respond to matters raised at the meeting
  - Members should not drive to meeting together, sit together, or talk to each other during the meeting
  - If a member wishes to speak, should be clear that the member is not representing the public body, but instead speaking as an individual



# Meeting (cont.)



- In OML 2012-69, the Carver School Committee was found to have violated the Open Meeting Law where a quorum of the Committee stepped outside a meeting of the Board of Selectmen to discuss an alternative to a ballot question relating to funding a school project.

# Definition: Deliberation



- “[A]n oral or written communication through any medium, including electronic mail, **between or among a quorum** of a public body on any public business within its jurisdiction...,” with certain express exceptions.

# Definition: Deliberation (cont.)

- Specifically includes e-mail communications
- **Provided that no opinions of governmental body are expressed, specifically excludes:**
  - Distribution of meeting agenda
  - Scheduling information
  - Distribution of other procedural meeting materials, reports or documents that may be discussed

# Deliberation, cont.



- In OML 2012-93, the AG found that an individual member of the Stow School Building Committee violated the Open Meeting Law by e-mailing a quorum of members asking for comments on a power point. The committee members responding did not violate the law because they did not “reply to all”.



# Deliberation (cont.)



- Practical considerations for board members include:
  - Don't ask for or express opinions, ideas, beliefs in an e-mail to other members
  - Never click on "reply to all"
  - Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business
  - Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog

# Definition: Public body



- “[A] multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.”



# Definition: Public body (cont.)

- Subcommittee - any multiple-member body created to advise or make recommendations to a public body
- Excludes committees or subcommittees appointed by sole officer who has authority to act independently, i.e., the so-called “Connelly Rule”

# Scheduling Meetings: Notice

- Timing:

- Requires notice to be posted at least 48 hours in advance of meeting, excluding Saturdays, Sundays and legal holidays

- Manner:

- Must be posted in manner conspicuously visible to the public at all hours in or on municipal building housing clerk's office; AG's regulations now allow posting on website; AG must be notified

# Scheduling Meetings: Notice

- Practical Implications

- For a Monday meeting, notice must be posted on Thursday
- If Monday is a holiday, a Tuesday meeting must be posted on Wednesday
- Clerk should time stamp notice to ensure accurate record exists of filing
- If posting is made in an “alternate location”, notice must be timely posted in both locations

# Scheduling Meetings: Notice

- Practical Implications

- A meeting may not be continued from one night to the next unless the meeting is properly posted therefor
- The notice required under the Open Meeting Law does not substitute for or otherwise supersede notice requirements under other applicable laws

# Scheduling Meetings: Notice

- Emergency:
  - Threat to public health and safety
  - Exception to 48 hour requirement; however, OML requires posting as soon as reasonably possible
  - Practical recommendations:
    - Comply with the law to the extent possible
    - Limit deliberations to emergency matter
    - Take minutes of meeting, and review and include with minutes of next regularly scheduled meeting.
    - When posting emergency meeting, consider posting a regular meeting as well, to allow body to ratify the action taken at emergency meeting.

# Scheduling Meetings: Notice

- Content of Notice:
  - Notice shall include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting”
  - This requirement has been interpreted by the AG to mandate that the notice include a listing of the particular items to be discussed, rather than general topics of discussion; must be detailed



# Scheduling Meetings: Notice

- E.g., OML 2011-15 (Melrose) – AG concluded that School Committee violated law by failing to include in notice of meeting name of non-union personnel with whom it would be negotiating.

# Scheduling Meetings: Notice

- E.g., OML 2011-9 (Natick) –AG concluded that School Committee violated law by failing to include specific details of proposed vote on Town Meeting warrant articles where item simply listed “Town Meeting Update”
- Recommended that notice should have said, “Discussion of Town Meeting Warrant Articles 1, 9, 10, 18, 32, 33 and 35. The School Committee may vote to recommend action on these articles at Town Meeting.”



# Scheduling Meetings: Notice

- E.g., OML 2011-11 (Freetown) – AG concluded that notice for Soil Board hearing was deficient where it listed “Renewal of Fall Soil Permits”, as it reasonably anticipated that particular permits would be considered and “it should take the additional step of listing into the meeting notice the details of those specific permits, including the name of the applicant and the location under consideration.”

# Scheduling Meetings: Notice

- Practical Implications
  - If a matter does not appear on the meeting notice, and the Chair did not reasonably anticipate the matter would be discussed at meeting, the law does not prohibit consideration of same
  - However, AG recommends that unless matter requires immediate action, matter not appearing on meeting notice should be put off to later meeting for which posting includes matter

# Scheduling Meetings: Notice

- Practical Implications
  - If a matter is brought to attention of Chair after notice has been posted, to the extent feasible, meeting notice may be updated to include such matter
  - This may be difficult if staff cannot communicate with Chair, and/or if Chair discovers matter shortly before meeting

# Scheduling Meetings: Notice

- E.g., OML 5-4-11 (Sturbridge) AG stated that although Board of Selectmen did not violate law by discussing matter not listed on meeting notice (matter was raised by member of public and not reasonably anticipated), body was “strongly encourag[ed] . . . not to consider topics that may be controversial or of particular interest to the public until the topic has been properly listed in a meeting notice in advance of a meeting.”

# Scheduling Meetings: Notice

- E.g., OML 2012-40, AG concluded that Stoughton Board of Selectmen did not violate Open Meeting Law where chair did not reasonably anticipate 48 hours prior to meeting that a particular subject matter would be addressed.

# Scheduling Meetings: Location

- Location of meeting must be accessible; required both by the OML and the ADA
- Practical considerations include:
  - Ability to meet in privately owned location
  - Moving meeting to different location (e.g., unanticipated attendance)
  - Closing door during open session



# Scheduling Meetings: Location

- In OML 2012-46, the AG concluded the Melrose School Committee Superintendent Search Committee violated the OML where meeting was held in locked area of high school, and the public was unable to gain access once greeter “left”

# Conducting Meetings: Agenda

- Legal and practical considerations
  - Legal: comply with new OML notice requirements
  - Practical: use to organize and regulate meeting
- Order of meeting
  - Generally, ministerial to specific (i.e. acceptance of minutes, committee reports, old business, new business, etc.
  - Two common areas of concern:
    - Open session/public comment session
    - Executive session

# Conducting Meetings: Public Session

- Practical considerations with public participation:
  - Allow? NOT required by law
  - Beginning or end of meeting?
  - Controls:
    - Protect individual rights
    - Don't try to resolve issues at time; consider adding issue as agenda item at future meeting
    - Avoid debate
    - Limit time per person and total time

# Conducting Meetings: Public Session

- In OML 2012-48 the AG concluded that the West Brookfield Zoning Board of Appeals was not required to permit members of the public to participate in its meetings, and further that the Board was not required to accept petitions or agenda topics submitted by the public.

# Conducting Meetings: Executive Sessions

- New OML has changed the following with respect to executive sessions:
  - Process for going into executive session
  - Permissible reasons (exemptions to OML) for executive sessions
  - Required timeline for review and release of minutes

# New Executive Session Requirement

- Before going into the executive session, the chair must state the purpose for the session, “stating all subjects that may be revealed without compromising the purpose for which the executive session was called”

# New Executive Session Requirement

- Practical Implications
  - Public body must limit discussion executive session to the matter(s) stated in the meeting notice (unless it was not reasonably anticipated by the Chair) and included in the vote to enter executive session

# New Executive Session Requirement

- In OML 2012-39, the AG concluded that the Amherst-Pelham Regional School Committee violated the law by discussing matters in executive session that were inconsistent with the stated purpose for the session



# Exemptions to OML – Executive Sessions

“(1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. ...”

- Adds right of individual to create independent record of session at own cost
- Meeting notice and vote likely need NOT refer to name of individual to be discussed



# Exemptions (cont.)



- “2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares ...”

- Alters text of both exemptions
- Inserts requirement with respect to exemption (3), and others, that chair declare “detrimental effect”

# Exemptions (cont.)



- AG has found that Open Meeting Law requires that contracts negotiated in executive session be approved or ratified in open session.
- This conclusion does not necessarily apply to other matters determined in executive session

# Exemptions (cont.)



- Practical considerations:
  - If executive session is anticipated, it should be listed in appropriate detail on meeting notice
  - Meeting notice, and related vote to enter session, should include all information possible that will not compromise purpose for which exemption will be used (i.e., name of non-union personnel or union must be identified in notice and vote if bargaining or negotiations will be conducted; case name to be discussed under litigation strategy must be listed, unless doing so would compromise Town's position.

# Conducting Meetings: Remote Participation

- Prior to new OML, most District Attorneys interpreted OML as prohibiting remote participation by a board member electronically
- Under new OML, remote participation okay if authorized by AG by regulation, which it has been, or letter ruling, as long as “chair” and quorum are physically present

# Remote Participation



- BOS must vote to allow Town boards to use, and any BOS policy applies to all boards; can impose additional limitations on use
- Quorum must be physically present
- Remote participants considered present and may vote
- Must be audible or visible to all in attendance
- May participate in executive sessions, provided that they certify that they are alone or that others cannot hear, or receive permission for others to be present.



# Conducting Meetings: Recording

- Under new OML, Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute)
- Recording by individuals:
  - Must inform the Chair
  - Chair must make required announcement
  - Chair may reasonably regulate recordings (placement, operation of equipment)

# Conducting Meetings: Minutes

- Must include:
  - Time, date, place, members present and absent
  - Summary of the discussions on each subject
  - Decisions made and actions taken, including a record of all votes
  - List of documents and other exhibits used by the body at the meeting
  - Documents and other exhibits used are part of meeting record, but not part of minutes



# Conducting Meetings: Minutes

- In OML 2012-42 the AG concluded that the Arlington Board of Selectmen violated the OML by failing to include a list of documents used at the meeting
- Established the following standards:
  - Document is physically present at meeting; and
  - Document is verbally identified; and
  - Content of document is discussed by members

# Minutes (cont.)



- Open session meeting minutes “shall not be withheld under any of the exemptions to the Public Records Law”, except that the following materials are exempt as personnel information:
  - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
  - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials and excluding resumes



# Executive Session Minutes



- Must be disclosed when purpose of exemption has been met, unless otherwise protected under the Public Records Law
- Must be reviewed periodically by chair or public body
- Must be provided within 10 days in response to request, unless review not yet undertaken (then by board's next meeting or 30 days, whichever occurs first)



# Procedural Issues



- Quorum: generally, a majority of the body
- Role of Chair:
  - Conducts meeting and keeps it moving forward
  - Opens agenda items
  - Determines questions of procedure
  - Determines who may speak
    - Under new OML, permission of chair to address meeting is required
  - Acts on motions: restates, conducts vote, states result
  - Preserves order and decorum



# Resources



Attorney General's Office:

<http://www.mass.gov/ago>

Attorney General's Open Meeting Law Website:

<http://www.mass.gov/ago/government-resources/open-meeting-law/>

Secretary of the Commonwealth Public Records Law:

<http://www.sec.state.ma.us/pre/preidx.htm>



# Any final questions?

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